

Employee Status

National Railroad Passenger Corporation (Amtrak)

- 1. Station Custodial Services**
- 2. Litigation Support Personnel**
- 3. Loss Prevention Consultants**

This is the decision of the Railroad Retirement Board regarding whether the above-listed services performed for National Railroad Passenger Corporation (Amtrak) constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. Amtrak is a covered employer under those Acts.

Amtrak issues purchase orders for station custodial services to be performed at unstaffed stations. The purchase orders generally provide for payment on a monthly basis for a period of one year. The services performed include opening the station before the first train of the day arrives, closing it after the last train leaves, and cleaning and repairing and generally maintaining the station. Amtrak does not require time and attendance reports and there is no supervision of the individuals involved. Those individuals are treated as independent contractors for the purposes of payment of income and employment taxes.

Since 1984 Amtrak has contracted for individuals to perform litigation support such as:

- * * * maintaining and updating Amtrak's law library; maintaining, updating, and retrieving files from Amtrak's law department central files; collecting, reviewing, and analyzing documents relevant to litigation; coding documents into a litigation support data base; supervising document coders and document handlers; and, organizing and preparing documents for microfilming; retrieving documents and microfilming.

The work is performed on Amtrak property and for Amtrak only, and is supervised by Amtrak. For the period 1984 through 1991 the payment for services was made through purchase orders issued to the individuals. A total of 225 individuals have provided these services for varying periods since 1984. In 1987 the Internal Revenue Service held these individuals to be employees of Amtrak. In 1991 Amtrak contracted with Ameritemps for provision of these services from two individuals who were previously performing services directly for Amtrak. These two individuals are now performing these services directly for Amtrak which is reporting them as employees.

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Loss prevention consultants provide investigative services for Amtrak

Through observations, particularly on board company trains, consultants investigate areas where evidence of lost revenue has been uncovered during routine audits, received in the form of a tip, or uncovered during routine observation. Assignments include, for example, riding a train in a particular corridor for a one-week period to audit conductor cash sales activities, evaluate employee service and performance, and observe station conditions. A common term used for people performing this kind of work is "spotters". A spotter may also be requested to perform office work, testify at disciplinary hearings, and perform related audit functions.

Amtrak contracts for these services on a six month basis. There were 37 individuals performing these services for the 1991-1992 period. Work is assigned to the individuals on an as needed basis and the hours vary depending on Amtrak's needs and the availability of the worker. They are free to offer their services to others. They are not expected to adhere to an established routine. Amtrak furnishes them with checklists to assist in investigations which state that "the material furnished by Amtrak [is] not 'all inclusive.' Loss prevention consultants are expected to use creativity, initiative, and observation skills to provide useful feedback to Amtrak regarding its workforce and operations." The individuals may decline assignments. Amtrak does not guarantee a minimum amount of compensation or hours. Because the individuals generally must work undercover, they usually do not work for Amtrak for long periods of time.

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal

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services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *." Paragraph (A) of the definition dates from the inception of the railroad retirement system. See Public Law No. 162, 75th Cong., Ch. 382, Part I, (50 Stat. 307).

The individuals performing the station custodial services are obligated to maintain those stations and to open and close them, but are not subject to the authority of Amtrak to supervise and direct the manner of performance. Accordingly, those individuals are not covered by paragraph (A), above. Since the services provided are not professional or technical as those terms are used in paragraph (B), those individuals are not covered by paragraph (B). Since the services rendered are not personal services in that the individuals under contract to Amtrak may and do substitute performance of those services by others, those services are not covered by paragraph (C). Accordingly, service by the individuals performing the station custodial services for Amtrak are not covered under the Railroad Retirement and Railroad Unemployment Insurance Acts.

The services performed by the litigation support personnel are performed subject to the continuing authority of Amtrak to supervise and direct the manner of performance, and those individuals are therefore employees of Amtrak. They were so held by the Internal Revenue Service, and it does not appear that Amtrak disputes this conclusion, although Amtrak does request relief from taxes based upon the contention that its treatment of the individuals as independent contractors was reasonable pursuant to section 530 of the Internal Revenue Code, which is not at issue here. That at least two of those individuals were treated by Amtrak as employees of Ameritemps as of September 1991 would not affect the creditability of the service in question. It is not

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contended that the supervision or work of those employees was altered at all by the arrangement with Ameritemps. Accordingly, service performed by litigation support personnel for Amtrak is covered under the Railroad Retirement and Railroad Unemployment Insurance Acts regardless of prior treatment of that service by Amtrak as being performed by independent contractors or by employees of a temporary employment agency.

The individuals performing investigative services for Amtrak as loss prevention consultants are not subject to the authority of Amtrak to supervise and direct the manner of performance. Accordingly, those individuals are not covered by paragraph (A). It is also the decision of the Board that those individuals are not covered under paragraph (B) in that, while it is questionable whether the services are professional or technical, in any case they are not "integrated into the staff of the employer;" they appear to have virtually no relationship with the staff of Amtrak and by the nature of their work must be kept separate from that staff. While it does appear that they are rendering "personal services" as that term is used in paragraph (C), the rendition of those services is not integrated into Amtrak's operations under (C) in that those services are not integral, central, or essential to Amtrak's enterprise.

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In Reynolds v. Northern Pacific Railway, 168 F. 2d 934 (8th Cir. 1948), the Eighth Circuit stated that for purposes of liability for taxes under the analogous provision of the Railroad Retirement Tax Act, persons performing services for a railroad may be regarded as railroad employees, even though they are not directly employed or directly paid by the railroad. Id. at 942. The Court further stated that the intent of parties to the contract to avoid coverage, the historical practice of the railroad industry, and factors deciding the employment relationship under other Federal laws should all be considered. Id. at 940-941. Under other federal laws numerous factors are involved in determining whether an individual is engaged in employee service and in the absence of judicial authority directly interpreting the employee service, provisions of the Railroad Retirement Act these factors may be useful in application of those provisions. A few of these are particularly noteworthy in Ms. Firestone's case. An individual may not be self-employed where the employer furnishes without charge the supplies and premises for the work. See Henry v. United States, 452 F. Supp. 253, 255 (E.D. Tenn., 1978). Payment on a hourly basis rather than at a specified amount per job also indicates that the individual is an employee. See Bonney Motor Express, Inc. v. United States, 206 F. Supp. 22, 26 (E.D. Va., 1962). An independent contractor offers his service to the general public rather than to a specific employer. See May Freight Service, Inc. v. United States, 462 F. Supp. 503, 507 (E.D. N.Y., 1978). Similarly, an independent contractor generally may substitute another individual to perform the contract work, while an employee must perform the work himself. Gilmore v. United States, 443 F. Supp. 91, 97 (D. Md., 1977).

The foregoing criteria indicate that Ms. Firestone was performing her service as an employee of the UTU. She worked on its premises, using its supplies and equipment, and assisting its full-time secretarial staff, at an hourly rate. She could not have arranged for another to perform the work in her place. She worked for the UTU four hours a day, five days a week and there is no evidence in the record that she held herself out as available to work for other parties. While it would appear that Ms. Firestone was supervised, as specified in paragraph (A) of the definition, by the UTU, to the extent supervision is required of a data entry clerk (and, whether actually supervised or not, she was subject to the continuing authority of the UTU to supervise), she was in any case "rendering, on the property used in the employer's operations, personal services, the rendition of which is integrated into the employer's operations" as is specified in paragraph (C).

Accordingly, it is the decision of the Board that Ms. Firestone's services for the UTU were performed as an employee of the UTU and consequently that that service is creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts.

4 August 1995

Steve -

Ed Fleming brought a copy of this letter to me. We submitted to the Board a proposed decision on the employee status of three groups of individuals (station custodial services personnel; litigation support personnel; loss prevention consultants) who do work for Amtrak. The letter is from the law firm representing Amtrak.

Should we respond to the letter (rather than Fleming), just saying that we have referred it to the Board? If so, should we address the section 530 argument? We included a response to that argument in the proposed Board decision.

Fleming says he doesn't want to give out the exhibits because Audit & Compliance gets handwritten information from individuals; that information can't practically be sanitized for disclosure, & he's convinced that the companies which are audited will, at least in some cases, fire the individuals who provide information.

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